

RECEIVED

DEC 6 1967

No. 22046

**United States Court of Appeals  
For the Ninth Circuit**

MASTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS,  
LOCAL UNION 524 affiliated with the INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN & HELPERS OF AMERICA, INC.,  
*Appellant,*

VS.

BILLINGTON d/b/a BILLINGTON BUILDERS SUPPLY  
and BILLINGTON BUILDERS SUPPLY, INC.,  
*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

HONORABLE WILLIAM N. GOODWIN, *Judge*

**APPELLANT'S OPENING BRIEF**

VANCE, DAVIES, ROBERTS & BETTIS  
By George H. Davies  
Attorneys at Law  
*Attorneys for Appellants*

1111 Fourth Avenue Building  
Seattle, Washington 98101

MR. PERRY J. ROBINSON  
Attorney at Law  
*Attorney for Appellee*

Liberty Building  
Kirkland, Washington 98901

FILED

DEC 7 1967



---

United States Court of Appeals  
For the Ninth Circuit

---

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS,  
LOCAL UNION 524 affiliated with the INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN & HELPERS OF AMERICA, INC.,  
*Appellant,*

vs.

S. BILLINGTON d/b/a BILLINGTON BUILDERS SUPPLY  
and BILLINGTON BUILDERS SUPPLY, INC.,  
*Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

HONORABLE WILLIAM N. GOODWIN, *Judge*

---

APPELLANT'S OPENING BRIEF

---

VANCE, DAVIES, ROBERTS & BETTIS  
By George H. Davies  
Attorneys at Law  
*Attorneys for Appellants*

Fourth Avenue Building  
Seattle, Washington 98101

MR. PERRY J. ROBINSON  
Attorney at Law  
*Attorney for Appellee*

Liberty Building  
Seattle, Washington 98901



## SUBJECT INDEX

### TABLE OF AUTHORITIES

	<i>Page</i>
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE CASE .....	2
Summary of the facts.....	2
History of Past Negotiations.....	2
Negotiation of 1963 Agreement.....	2
SPECIFICATION OF ERROR.....	14
SUMMARY OF THE ARGUMENT.....	15
ARGUMENT .....	16
1. F. Velikanje was authorized and did make an offer on behalf of Billington Builders Supply, Inc., which was accepted by plaintiff.....	17
Billington Builders Supply, Inc., was part of a multi-employer group bargaining with plaintiff and did not timely or effectively withdraw from such multi-employer group.....	22
D. S. Billington d/b/a Billington Builders Supply as the former Employer and Billington Builders Supply, Inc., as the "Successor Employer" were each required to arbitrate the effect of the acquisition of the business on the rights of employees .....	24
Prayer of complaint did not preclude court from granting relief to plaintiff.....	25
Conclusion .....	27
CERTIFICATE .....	28

### TABLE OF CASES

<i>Anderson Lithograph Co.</i> , 124 NLRB No. 117, 44 LRRM 1544 .....	24
---	----



## TABLE OF CASES

<i>Bellingham Automobile Dealers Association,</i> 90 NLRB No. 59, 26 LRRM 1221.....	P
<i>Bunker Hill &amp; Sullivan Mining Co.,</i> 89 NLRB No. 8, 25 LRRM 1547 .....	
<i>Conway's Express v. NLRB,</i> (2nd C.A.) 195 F. 2d 906, 29 LRRM 2617 .....	
<i>Detroit Window Cleaners Union, Local 139 (Daelite</i> <i>Service Co.)</i> 126 NLRB No. 8 45 LRRM 1275....	
<i>John Wiley &amp; Sons v. Livingston,</i> 376 U.S. 543, 11 L. ed. 2d 898 .....	
<i>Korner Kafe, Inc.,</i> 156 NLRB No. 107, 61 LRRM 1213 .....	
<i>Kroger Co.,</i> 148 NLRB No. 69, 57 LRRM 1021; <i>United States Warehouse Company,</i> 98 NLRB No. 9, 29 LRRM 1298; <i>Furniture Employers'</i> <i>Council,</i> 96 NLRB No. 151, 28 LRRM 1623.....	
<i>Lewis v. Cable,</i> 107 F. Supp. 196, 30 LRRM 2603....	
<i>Local 174, Teamsters, Chauffeurs, Warehouse &amp;</i> <i>Helpers of America v. Lucas Flour Co.,</i> 369 U.S. 95, 104, 7 L. ed. (2d) 593, 600.....	
<i>Local Lodge 595, District 152, I.A.M. v. Howe</i> <i>Sound Co.,</i> 350 F. 2d 508, 60 LRRM 2065.....	
<i>Lozano Enterprises v. NLRB</i> (9th C.A.) 327 F. 2d 814, 55 LRRM 2510.....	
<i>Nelson v. Victory Electric Works</i> [U.S. Dist. Ct., Dist. Md.] 55 LRRM 2652.....	
<i>NLRB v. Jeffries Banknote Co.,</i> (9th C.A.) 281 F. 2d 893, 46 LRRM 2919.....	
<i>NLRB v. Sheridan Creations, Inc.,</i> (2nd C. A.) 357 F. 2d 245, 61 LRRM 2586.....	
<i>NLRB v. Tulsa Sheet Metal Works, Inc.,</i> 367 F. 2d 55, 63 LRRM 2217 .....	

## TABLE OF CASES

	<i>Page</i>
<i>Quality Limestone Products, Inc.</i> , 134 NLRB No. 62, 53 LRRM 1357; <i>Kroger Co.</i> , 148 NLRB 69, 57 LRRM 1021 .....	22
<i>Shiel Bros. Electric Sign Service Co., Inc.</i> , 53 NLRB No. 28 .....	24
<i>Snail Associates, Inc.</i> , 120 NLRB No. 66A, 2 LRRM 1119 .....	23
<i>Seaway Express v. General Teamsters Local 249</i> , 330 F. 2d 859, 56 LRRM 2085.....	21
<i>Secoma Printing Pressmen's Union No. 44 and Valley Publishing</i> , 131 NLRB No. 133, 48 LRRM 1187 .....	21
<i>Shinner Motor Livery, Ltd.</i> , 160 NLRB No. 127, 53 LRRM 1242 .....	21
<i>Textile Workers v. Lincoln Mills</i> , 353 U.S. 448, 156, 1 L. Ed. (2d) 972, 980.....	16
<i>Wackenhut Corp. v. Plant Guard Workers, Local 151</i> , (9th C. A.) 332 F. 2d 954, 56 LRRM 2466....	25
<i>Wards Cove Packing Company, Inc., et al.</i> , 160 NLRB No. 23 .....	22

## OTHER AUTHORITIES

Section 301 of the Labor-Management Relations Act, 1947, 29 USC §185.....	2, 16
29 USC §1291 .....	2
Rule 54(c), F.R.C.P.....	26





United States Court of Appeals  
For the Ninth Circuit

TEAMSTERS, CHAUFFEURS, WAREHOUSE-  
MEN & HELPERS, LOCAL UNION 524 af-  
filiated with the INTERNATIONAL BROTHER-  
HOOD OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN & HELPERS OF AMERICA,  
Appellant,

vs.

S. BILLINGTON d/b/a BILLINGTON  
BUILDERS SUPPLY and BILLINGTON BUILD-  
SUPPLY, INC., Appellee.

No. 22046

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

HONORABLE WILLIAM N. GOODWIN, *Judge*

APPELLANT'S OPENING BRIEF

**JURISDICTIONAL STATEMENT**

This is an appeal from findings of fact, conclusions of law and judgment in favor of defendants-appellees in an action brought by plaintiff-appellant to require specific performance of an arbitration clause of a collective bargaining agreement.

After a trial on the merits before the United States District Court for the Eastern District of Washing-

ton, Southern Division, findings and conclusions (Vol. I, R. 49-52) and judgment of dismissal (Vol. I, 54) were entered on March 24, 1967.

The District Court had jurisdiction by virtue of Section 301 of the Labor-Management Relations Act, 1947, 29 USC §185. (Vol. I, R. 33-34 Pretrial Order on Jurisdiction).

This Court has jurisdiction by virtue of 28 USC §1291 (appeal from a final decision of a District Court).

## STATEMENT OF THE CASE

### Summary of the Facts

Plaintiff had successive collective bargaining agreements with defendant D. S. Billington, d/b/a Billington Builders Supply all of which were negotiated through E. F. Velikanje, an attorney at law. Shortly before the anniversary date of the 1961-1963 collective bargaining agreement, Billington formed defendant corporation, Billington Builders Supply Inc. The corporation likewise appointed Velikanje to negotiate with plaintiff. Velikanje submitted an offer to plaintiff which plaintiff accepted. Velikanje communicated acceptance of the offer to the corporation. The corporation then refused to sign a collective bargaining agreement. A dispute arose between plaintiff and the corporation; plaintiff requested arbitration and defendants refused.

### History of Past Negotiations

Defendant D. S. Billington (hereinafter referred to as

as Billington) prior to Feb. 15, 1963, was engaged in business within the City and County of Yakima, Washington, under the firm name and style of Billington Builders Supply as a sole trader in retail and wholesale sale of building materials. (Vol. I, R. 34, Pretrial Order — Admitted Fact No. 3). Commencing in 1954 Billington had consecutive collective bargaining agreements with the plaintiff, Teamsters, Chauffeurs, Warehousemen & Helpers Union Local 524 (hereinafter referred to as Teamsters Local 524) (Tr. 93). Billington appointed, as his agent for the negotiation of the collective bargaining agreement which spanned the period from 1954, E. Frederick Velikanje, a Yakima attorney at law (Vol I, R. 34, Pretrial Order — Admitted Fact No. 4; Tr. 10-11). Velikanje had represented the building material industry in the Greater Yakima area since the end of World War II and had negotiated collective bargaining agreements with Teamster Local 524 on behalf of Billington and several other employers engaged in the retail and wholesale sale of building materials and related products in the Greater Yakima area (Vol I, R. 34, Pretrial Order — Admitted Fact No. 4, Tr. 10, 28-29, 44-45).

### Negotiation of 1963 Agreement

The 1961 negotiations between Teamsters Local 524 and Velikanje resulted in a collective bargaining agreement between Teamster Local 524 and Billington which, by its terms, remained in effect from April 1, 1961, until April 1, 1963 (Vol I, R. 34, Pretrial Order — Admitted Fact No. 3; Tr. 93, Pltf. Exh. 1, Section 17). Such agreement provided: "It may be renewed for negotiation of changes or termination by either party giving sixty (60) days notice prior to



April 1, 1963.” (Pltf. Ex. 1, Section 17). No notice of termination was given. Instead, Teamster Local 524 gave sixty (60) days “notice of . . . desire to open the agreement for the negotiation of changes” by letter to Billington dated January 22, 1963, (Pltf. Ex. 2). Upon receipt of such letter Billington turned it over to Velikanje and at the same time instructed him to negotiate the collective bargaining agreement with Teamster Local 524 (Vol I, R. 34 Pretrial Order — Admitted Fact 4; Tr. 13, 94-96). On February 1, 1963, E. Frederick Velikanje wrote Fred H. Wehde, the Secretary-Treasurer of Teamster Local 524, as follows:

“Your letters addressed to the building materialmen in Yakima are beginning to come in to the office, and, as in the past, I will be handling the negotiations on their contract. I would appreciate your advising me as soon as possible what modifications you feel should be made to the contract. I am quite frank to state that many people, at the present time, feel that there should be no modification, but let’s see where our point of difference might be, and see if we can dispose of this without too much difficulty.” (Pltf. Ex. 3)

Fred H. Wehde replied to Velikanje’s letter on February 4th by letter dated February 6, 1963, addressed to Velikanje, in which he asked:

“I would appreciate it very much if you would advise me as to the names of the Building Material Employers that you are representing for the purposes of negotiating a labor agreement.

“As you indicated in your letter, you would like to consummate the agreement as rapidly as possible as so would we. We will try to meet with you as soon as possible.” (Pltf. Ex. 4)

On February 13, 1963, Velikanje wrote the following

reply to Fred Wehde:

“In response to your letter of February 6, 1963, wherein you asked the names of the Building Material employers that we will be representing on the labor agreement, please be advised that we will represent the following:

Sears Lumber Market;  
 Helliesen Lumber & Supply;  
 Granger Clay Products;  
 Fosseen's;  
 McGuire Lumber Company; and  
 Billington Builders Supply.” (Pltf. Ex. 5)

On February 15, 1963, Billington and Ormand Fluegge, along with Perry J. Robinson, their attorney, formed the defendant corporation, “Billington Builders Supply, Inc.”, and Ormand Fluegge became its President and General Manager (Vol. I, R. Pretrial Order — Admitted Fact No. 5).

Negotiation of the 1963 collective bargaining agreement were conducted by Velikanje and Wehde and involved a series of meetings covering a period of time from April to September 1963. Velikanje first met with Wehde on April 11, 1963 (Tr. 15). Following that meeting Velikanje addressed a letter dated April 15, 1963, to the employers he represented, including Billington, advising them of the results of his meeting and asked that they give him their opinions as soon as possible (Tr. 15-16). Velikanje then called a meeting of the employers on April 30, 1963, but he did not keep a record of those who attended (Tr. 16). Velikanje next met with Wehde on May 6, 1963, and then wrote the employers, including Billington, a report dated May 17, 1963, closing such report with the following statement:

“It will undoubtedly be necessary that I meet with them again next week, and I would appreciate any comments that anyone has to make in relation to the procedure so far.” (Tr. 17)

Velikanje held a meeting with the employers on May 29, 1963, and Ormund Fluegge attended such meeting on behalf of Billington Builders Supply, Inc. (Tr. 17). This was apparently the only meeting called by Velikanje at which a representative of defendants was present (Tr. 17, 36, 105-107). At the May 29, 1963 meeting the defendants for the first time told Velikanje of the fact of incorporation (Tr. 35, 106). Fluegge testified with regard to the May 29, 1963 meeting:

“Q. Did you tell Mr. Velikanje not to represent you at all?

A. I did not.

Q. You left it that way?

A. That is correct.” (Tr. 106-107)

Following the May 29, 1963, meeting with the employers Velikanje wrote to Wehde on June 4, 1963, and sent blind carbon copies to each of the employers including Billington Builders Supply, Inc. (Tr. 108). The next meeting between Velikanje and plaintiffs occurred on June 24, 1963, before the Washington State Mediator and such meeting was followed by a meeting between Velikanje and the employers on June 26, 1963. (Tr. 18)

A further meeting between Velikanje and Wehde before the State Mediator as held on July 11, 1963, at which Wehde indicated Teamster Local 524 had rejected the employers' offer to that date on sick leave wages and vacation (Tr. 19). On July 15, 1963, V



je advised the employers, including Billington, of his rejection (Tr. 19).

The final meeting between Velikanje and Wehde occurred on August 27, 1963, at which the State Mediator was also present. (Tr. 19) Velikanje stated at this meeting that he would recommend to the employers a five cent an hour increase in wages on a one year contract, retroactive to April 1, 1963, and would give an answer to Wehde within the following week (Tr. 19). Velikanje called a meeting of the employers on Aug. 30, 1963 (Tr. 19). Velikanje testified that his records did not show which employers were present at the Aug. 30, 1963, meeting. He did testify, however, that he personally telephoned Billington Builders Supply, Inc., and advised them of the August 30, 1963, meeting and that defendants had received a copy of each notice of the progress of negotiations and had been notified of each employer meeting (Tr. 19). Fluegge admitted receiving the notices from Velikanje (Tr. 107).

As a result of the August 30, 1963, meeting between Velikanje and the employers an offer was made to Plaintiff. The offer was transmitted orally to Wehde on August 30, 1963, and confirmed in writing by the following letter dated September 3, 1963:

“Teamsters Local 524  
16 North 3rd Avenue  
Yakima, Washington  
*Attention: Mr. Fred Wehde*  
*Re: Building Supply Industry Agreement*

“Dear Mr. Wehde:

“This letter will confirm our telephone conversation of August 30th to the effect that the employers, under the Building Trades Industries

that we represent and for whom we have been negotiating, have authorized an offer that presents wages be increased 10c an hour now, 10c an hour April 1, 1964, and 10c an hour April 1, 1965, with no retroactive pay. This increase would take effect during the pay-week that we receive an affirmative answer from you. The other matters, of which we have been negotiating, our answer would remain the same.

“You are further advised that for the purpose of trying to terminate this situation, as we advised, this offer is going to be open for a period of ten (10) days, and if during that time you have not accepted same or you have rejected it, then the offer of the employers shall revert back to our previous offer. By the making of this counter offer, you will recognize that the employers have turned down your counter proposal of 5c an hour increase retroactive to April 1, 1963, on a one-year contract.

“Very truly yours,

VELIKANJE & MOORE

By: /s/ E. F. Velikanje  
E. F. Velikanje”  
(Pltf. Ex. 6)

A copy of the foregoing offer was sent by Velikanje to Defendant Billington Builders Supply, Inc., and copies were likewise sent to each of the other employers for whom Velikanje was authorized to bargain, namely: Sears Lumber Market; Helliesen Lumber & Supply; Granger Clay Products; Fosseen's and McGuire Lumber Company. (Tr. 22)

Concerning said offer Velikanje testified as follows:

“Q. Was the offer that you set out in your letter of Sept. 3rd made on behalf of Billington

“A. It was made on behalf of those that attended the meeting and from whom I had authority.

“Q. Would you look on Exhibit Number 5?

“A. Yes.

“Q. Did you make the offer of September 3rd on behalf of all the employers that are listed on Exhibit Number 5?”

“A. I felt, yes, sir, that I was.

“Q. Up to the time of this September 3rd letter Mr. Velikanje, had you received any objection from Mr. Ormund Fluegge, or Mr. Billington, or any representative of either of them through the course of negotiations?

“A. Not to my recollection, except silence.” (Tr. 23-24)

On September 6, 1963, a Teamster Local 524 meeting was called of those members of plaintiff who worked for the previously named employers in the building material industry in Yakima whom Velikanje represented in the negotiations with Wehde. (Tr. 63) Employees from each of the employers were present except Granger Clay Products. (Tr. 63) In attendance at such meeting was the one union member of plaintiff who was employed by the defendant Billington Builders Supply, Inc., James Billington. (Tr. 63-64) At the union meeting on September 6, 1963 Wehde reviewed the negotiations to date

---

Exhibit No. 5 is the letter of E. Frederick Velikanje to Fred Wehde dated February 13, 1963, which reads as follows:

“In response to your letter of February 6, 1963, wherein you asked the names of the building material employers that we will be representing on the labor agreement, please be advised that we will represent the following:

“Sears Lumber Market;  
Helliesen Lumber & Supply;  
Granger Clay Products;  
Fosseen's  
McGuire Lumber Company;  
Billington Builders Supply.”



and then read Velikanje's letter dated September 1963, setting forth the offer which the industry was making to the plaintiff (Tr. 64). A secret ballot among the members of plaintiff was conducted and by a vote of ten to two the members voted to accept the employers' offer set forth in Velikanje's letter dated Sept. 3, 1963 (Tr. 64).

On September 9, 1963, Wehde went to the office of Velikanje at which time Wehde advised him that the plaintiff had accepted the employers' offer. (Tr. 2)

Under date of Sept. 13, 1963, E. Frederick Velikanje sent a letter to Billington Builders Supply, Sears Lumber, Helliesen Lumber, Granger Clay Products, Fosseen's and McGuire Lumber which stated as follows:

"This letter will supplement our copy of letter of September 3, which was forwarded to you, but which was addressed to Teamsters' Local 524. Mr. Fred Wehde has advised us at the meeting on Friday, September 6, the employees have accepted our counter proposition. We are now in the process of preparing the necessary papers. It is true, in our agreement we had stated that as of the pay week that we received an affirmative answer from them that the pay would start. However, in our negotiations we have agreed that the acceptance of this was made Friday, September 6, and this would, therefore, mean that this increase of pay would start as of Monday, September 2. Therefore, in this next pay check will you make such an arrangement so that the full amount for September is included. It is merely to notify you of the fact, so you can get your pay check in order." (Tr. 22-23)

Between September 14 and September 30, 1963, Velikanje received a telephone call from Ormrod

uegge at which time Fluegge told Velikanje that Billington Builders Supply, Inc., was not interested in signing the contract and was no longer interested in any of the negotiations. (Tr. 24-25, 108, Vol. I. R. Pretrial Order—Admitted Fact 6)

Thereafter Wehde attempted to secure through Velikanje an executed copy of the collective bargaining agreement which had been submitted to Billington Builders Supply, Inc., for its signature. Apparently Velikanje overlooked the communication which he had received from Ormund Fluegge that defendant Billington Builders Supply, Inc., would not sign the contract, and on October 15, 1963, in a letter to Wehde enclosing executed copies of the contract from all other employers made no mention of defendant's refusal to sign the contract and merely stated he had not yet received a signed contract from Billington. (Pltf's Ex. 8)

As late as December 9, 1963, Velikanje wrote to defendant Billington Builders Supply, Inc., requesting that it sign the collective bargaining agreement submitted to them earlier by Velikanje. (Pltf's Ex. 8, Tr. 26-27)

Ormund Fluegge responded to the December 9, 1963, letter of Velikanje, repeating the same thing that he had earlier told Velikanje, but again this information, whatever its nature, was not communicated to Wehde or any other representative of the plaintiff because as late as July 30, 1964, Wehde wrote to D. S. Billington asking for a signed agreement. (Tr. 27, 108-109, Dft's Ex. 21) He never received a reply. (Tr. 68)

Finally in March 1965, when the question arose con-

cerning the vacation pay due James Smith on his termination, the plaintiff first learned of Defendant's contention that no collective bargaining agreement with Teamster Local 524 existed. (Tr. 68-69) Teamster Local 524, after failing to resolve the dispute on May 13, 1965, requested in the following letter that the matter be submitted to arbitration: (Dft's Ex. 23)

“Mr. D. S. Billington  
Billington Builders Supply  
406 W. Lenox  
Yakima, Washington

Dear Sir:

On prior occasions we have discussed with your representative whether Billington Builders Supply Company is bound by the collective bargaining agreement between Teamster Local 524 and the Building Supply Industry in Yakima, Washington and your failure to comply with the terms of such contract. Since we have been unable to resolve these issues Teamsters Local 524 demand that these issues be submitted to arbitration.

Under Article XI of the collective bargaining agreement, a copy of which is enclosed, we are required to meet for the purpose of selecting a neutral arbitrator.

“We suggest a meeting with you or your representative at your office at 2:00 P.M. on May 21, 1965. We ask that you acknowledge in writing by the 19th of May, 1965, that the above mentioned meeting date is acceptable to you or, if it is not acceptable, we ask that you specify a time and place when the meeting may be held. If we do not hear from you by the last mentioned date we will assume that you are refusing to arbitrate this dispute and will act accordingly.

Very truly yours,  
F. H. Wehde  
Secretary-Treasurer



FHW: 1

Encl.-1

c: Perry Robinson, Attorney  
Cert Mail''

Defendants refused. (Pltf's Ex. 9) This suit to compel arbitration was then commenced.

During the period from Feb. 15, 1963 (date of incorporation) until April 1, 1963, (anniversary date of the 1961-1963 collective bargaining agreement) and from April 1, 1963, until James Smith left the employment of Defendant Billington Builders Supply, Inc., in February 1965, Billington Builders Supply, Inc., observed all the terms and conditions of the 1961-1963 and 1963-1966 collective bargaining agreement.

The 1963-1966 collective bargaining agreement (Pltf's Ex. 11) provided in Article XII for a wage increase effective September 1, 1963, and for a 10c annual increase on April 1, 1964. James Smith received his pay retroactive to September 1, 1963, as provided in the 1963-1966 contract (Tr. 52, 99, 110). He received the vacation provided in such agreement (Tr. 53). He received the overtime provided in such agreement (Tr. 54).

Article XIV of the 1963-1966 collective bargaining agreement (Pltf's Ex. 11) required the payment of \$7.85 a month into the Washington Teamsters Welfare Trust and Article XV required payment of 10c an hour into the Western Conference of Teamsters Pension Trust Fund. Billington Builders Supply, Inc., made the Health and Welfare and Pension monthly premium payments for James Smith until his termination. (Vol. I. R. 39 Plaintiff's Exhibits 13 and 14, Plaintiff's Exhibits 13 and 14, Tr. 88-89, 99,

111)

Velikanje for services rendered in negotiating the 1963-1966 collective bargaining agreement billed each of the employers, Sears Lumber, Helliesen Lumber, Granger Clay Products, Fosseen's, McGuire Lumber and Billington Builders Supply, Inc., a proportionate share. Defendant Billington Builders Supply, Inc. paid Velikanje its proportionate share. (Vol. 1, R. 3, Pretrial Order—Admitted Fact 9)

### SPECIFICATION OF ERROR

1. The court erred in finding that E. Frederick Velikanje was not authorized to act as a bargaining representative for the defendant, Billington Builders Supply, Inc. (Vol. 1, R. 5, Finding of Fact VI)
2. The court erred in finding that neither defendant Billington Builders Supply, Inc., nor its authorized representative entered into negotiations with the plaintiff and that the defendant informed E. Frederick Velikanje and representatives of the plaintiff that it did not wish to enter into a union contract and would not do so. (Vol. I, R. 51, Finding of Fact VII)
3. The court erred in finding that there was no contract in existence at the time James Smith terminated his employment between the plaintiff and either defendant. (Vol. I, R. 51, Finding of Fact VIII)
4. The court erred in concluding that neither defendant had an obligation to arbitrate the dispute that existed between them and the plaintiff and in concluding that the plaintiff's complaint should be dismissed.
5. The court erred in failing to find from the ev

- dence that E. F. Velikanje was authorized and did make an offer on behalf of defendant Billington Builders Supply, Inc., which was accepted by plaintiff.
5. The court erred in failing to find from the evidence that defendant Billington Builders Supply, Inc., was part of a multi-employer group bargaining with plaintiff and did not timely or effectively withdraw from such multi-employer group prior to a contract being made with plaintiff.
  7. Defendant D. S. Billington d/b/a Billington Builders Supply, as the former employer and defendant Billington Builders Supply, Inc., as the "successor employer" were each required to arbitrate the effect of the acquisition of the business on the rights of employees.
  3. The court erred in failing to find from the evidence that defendant Billington Builders Supply, Inc., was stopped to deny the existence of a collective bargaining agreement with plaintiff.
  9. The court erred in concluding that the prayer of plaintiff's complaint precluded the court from granting relief. (Tr. 120—Trial Court's Memorandum Opinion)

## SUMMARY OF ARGUMENT

1. Irrespective of whether Velikanje represented defendant Billington Builders Supply, Inc., individually or as part of a multi-employer group, he was authorized to make an offer for a collective bargaining agreement with plaintiff on behalf of said defendant corporation and did on September 3, 1963, which offer was accepted by plaintiff not later than September 9, 1963. Withdrawal of Velikanje's authority, if valid, did not occur until sometime between September 14th and 30th, 1963.



2. As part of a multi-employer group bargaining with plaintiff, defendant Billington Builders Supply Inc., could only under applicable law withdraw from such group at an appropriate time and by giving notice in writing to plaintiff, neither of which was done here. Therefore, defendant Billington Builders Supply, Inc., is bound by the results of the negotiations.

3. By its conduct of not disclosing to plaintiff its reservation to not sign the 1963-1966 collective bargaining agreement and by its conduct in adhering to all the terms and conditions of such agreement until March 1965, defendant Billington Builders Supply Inc., is estopped to deny that it is a party to such agreement and bound by all its terms.

## ARGUMENT

Suits which arise under Section 301 of the Labor Management Relations Act, 1947, 29 USC §185, are controlled by "Federal law which the courts must fashion from the policy of our national labor laws. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 L. Ed. (2d) 972, 980. As the United States Supreme Court stated in *Local 174, Teamsters, Chauffeurs Warehouse & Helpers of America vs. Lucas Flour Co* 369 U.S. 95, 104, 7 L ed. (2d) 593, 600:

"With due regard to the many factors which bear upon competing state and federal interests in this area, *California v. Zook*, 336 US 725, 730, 731, 93 L ed 1005, 1009, 1010, 69 S. Ct. 841; *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230, 231, 91 L. ed 1447. "1459, 1460, 67 S. Ct. 1146, we cannot but conclude that in enacting §301 Congress intended doctrines of federal labor law un-

formly to prevail over inconsistent local rules.”

F. Velikanje was authorized and did make an offer behalf of Billington Builders Supply, Inc., which accepted by plaintiff.

The Trial Court in Finding of Fact No. VI found:

“That the said E. FREDERICK VELIKANJE was not authorized to act as a bargaining representative for the defendant, BILLINGTON BUILDERS SUPPLY, INC.” (Vol. I, R. 50)

In Finding of Fact VII the Trial Court found:

“...neither defendant, Billington Builders Supply, Inc., nor its authorized representative entered into negotiations with plaintiff, and that the defendant informed the said E. FREDERICK VELIKANJE and representatives of the plaintiff that it did not wish to enter into a Union contract and would not do so.” (Vol. I, R. 51, Pretrial Order—Finding of Fact VII)

There is no evidence to support such findings.

Velikanje testified:

“A. (Continuing) I called the various people I had represented before, and asked them if they wanted me to handle their negotiations this year along with the others.

“Q Did you call Mr. Dwight Billington?

“A. To the best of my recollection, I did.

“Q. And what did he—and he advised you—

“A. I say this—either that, or I have some memory of meeting Mr. Billington on the street. It could have happened that way. I

remember talking with him one time in front of the Seattle-First National Bank. It could have been that instead of on the phone.

“Q. And did he authorize you to negotiate with him?”

“A. Yes.” (Tr. 13)

Mr. Dwight Billington testified as follows as to the authority of Velikanje:

“Q. In 1963 did you receive a notice from the Union, telling you that they wanted to open negotiations of your contract?”

“A. What year was that?”

“Q. In 1963.

“THE COURT: There is a copy of the letter that is one of the exhibits; here it is, Counsel. Is that the one you are referring to?”

“MR. ROBINSON: Yes.

“THE COURT: Take it up and show it to him.

“THE WITNESS: Yes.

“Q. (By Mr. Robinson) That was addressed to you personally?”

“A. Yes.

“Q. What did you do with the letter?”

“A. I gave it to Velikanje.

“Q. You took it down to Mr. Velikanje’s office?”

“A. I probably mailed it to him, I don’t remember.

“Q. You don’t remember. Did you have any conversation with him at all?”

“A. No.



“Q. Was it your understanding then that he was conducting negotiations—you intended him to negotiate the contract for you?

“A. Yes.” (Tr. 94)

Mr. Ormund Fluegge attended a meeting at Velikanje's office on May 29, 1963, and testified that at that meeting.

“A. I told him that we had incorporated, and that I wasn't sure whether we were going to sign the contract yet or not, that I would want to confer further with my attorney.

“Q. Was there much of anything done at the meeting?

“A. Very little was accomplished.

“Q. And you left?

“A. That is correct.

“Q. Did you tell Mr. Velikanje not to represent you at all?

“A. I did not.

“Q. You left it that way?

“A. That is correct.”

“Q. Then I assume that your company received some correspondence or phone calls from Mr. Velikanje during the course of the summer?

“A. That is correct.” (Tr. 106, 107)

Moreover, in Admitted Fact No. 4, it was agreed in the Pretrial Order:

“4. That on about January 22, 1963, Defendant, D. B. BILLINGTON, received a letter attached as Appendix B to Plaintiff's complaint and listed in this Pre-Trial Order as Plaintiff's Exhibit 2. That said letter was referred to De-

fendant D. S. Billington's attorney, E. F. Velikanje, who was authorized and had in years prior thereto been authorized to negotiate the terms of labor agreements with the plaintiff (Vol. 1, R. 34)

Velikanje in his letter of February 13, 1963, to Wehde (Pltf's. Ex. 5) stated in part:

"Please be advised that we represent the following:

"... Billington Builders Supply"

Defendants never denied Velikanje's authority to make such statement to plaintiff; on the contrary, Admitted Fact No. 4 of the Pretrial Order defendants admitted that Velikanje was authorized to negotiate the terms of the labor agreement with the plaintiff (Vol. 1, R. 34)

All through the negotiations Velikanje reported the progress of same to each of the employers in the Building Material Supply Industry in Yakima, including defendants. During the progress of such negotiations agreement was reached on certain items. Through all such negotiations there was no revocation of authority by defendants of Velikanje to act as the collective bargaining representative, or disclosure to plaintiff of any limitation of Velikanje's authority.

Finally on Sept 3, 1963, Velikanje made an offer on behalf of Billington Builders Supply, Inc. (Pltf's Ex. 6) Copy of such offer was sent to Billington Builders Supply, Inc. Plaintiff accepted such offer on Sept. 6, 1963, and communicated such acceptance to Velikanje on Sept. 9, 1963.

Velikanje advised Billington Builders Supply, Inc.

the acceptance of the offer by plaintiff by letter dated Sept. 13, 1963. (Tr. 22-23) Any intent to revoke authority of Velikanje did not occur until after acceptance of the offer was communicated to Velikanje, and Velikanje, in turn, had communicated the acceptance to Billington Builders Supply, Inc. Any attempted revocation of authority after offer, acceptance and communication of acceptance could have no effect on the validity of the contract which resulted as a result of such offer, acceptance and communication of acceptance.

As this court has observed, "the normal rules of offer and acceptance are...determinative as to whether an agreement has been reached in a collective bargaining situation." *Lozano Enterprises vs. NLRB* (2nd C.A.) 327 F. 2d 814, 55 LRRM 2510.

Applying the decisions of the National Labor Relations Board a collective bargaining agreement was reached Sept. 9, 1963. *Tanner Motor Livery, Ltd.*, 160 NLRB No. 127, 63 LRRM 1242; *Tacoma Printing Pressmen's Union No. 44 and Valley Publishing*, 131 NLRB No. 133, 48 LRRM 1187.

The fact that the employer did not execute the collective bargaining agreement does not affect the validity of the agreement reached on Sept. 9, 1963. *Conner's Express vs. NLRB*, (2nd C. A.) 195 F. 2d 906, 53 LRRM 2617; *Roadway Express vs. General Teamsters, Local 249*, 330 F. 2d 859, 56 LRRM 2085.



Billington Builders Supply, Inc., was part of a multi-employer group bargaining with plaintiff and did not timely or effectively withdraw from such multi-employer group.

The test of multi-employer bargaining was laid down by the National Labor Relations Board in *Bunker Hill & Sullivan Mining Co.*, 89 NLRB No. 8, LRRM 1547:

“ ‘The Board has held that the essential element for establishing a multiple-employer unit is participation by a group of employers, whether members or nonmembers of an association, either personally or through an authorized representative, in joint bargaining negotiations. We have found such units appropriate although the particular employers involved did not belong to a formal employer association, and each employer had its own representative present during negotiations, and the negotiations resulted in the execution of separate, but identical contracts.’ ”

The National Labor Relations Board has held that a multi-employer unit existed even though the representative of the employer indicated in writing to the union that he was representing the various employers on “an individual and separate employer basis.” *Wards Cove Packing Company, Inc., et al*, 160 NLRB No. 23.

Multi-employer bargaining exists even though the participating employers retain the right to approve or disapprove the agreement reached. *Quality Limestone Products, Inc.*, 134 NLRB No. 62, 53 LRRM 1357; *Kroger Co.*, 148 NLRB 569, 57 LRRM 1021.

Multi-employer bargaining existed even assuming a representative of the employers had no authority to bind the individual employers. *Bellingham Automobile Dealers Association*, 90 NLRB No. 59, 26 LRRM 1221.

Bargaining with individual employers within the multi-employer group on limited matters is not inconsistent with the concept of collective bargaining in the multi-employer unit. *Kroger Co.*, 148 NLRB No. 69, 57 LRRM 1021; *United States Warehouse Company*, 98 NLRB No. 9, 29 LRRM 1298; *Furniture Employers' Council*, 96 NLRB No. 151, 28 LRRM 1623.

The National Labor Relations Board in *Retail Associates, Inc.*, 120 NLRB No. 66A, 42 LRRM 1119, published the following rules governing the withdrawal of an employer from multi-employer bargaining:

“We would accordingly refuse to permit the withdrawal of an employer or a union from a fully established multi-employer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed upon date to begin the multi-employer negotiations. Where actual bargaining negotiations based on the existing multi-employer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.”

This court relied upon the *Retail Associates* case, supra, in *NLRB v. Jeffries Banknote Co.*, (9th C. A.) 501 F. 2d 893, 46 LRRM 2919, when it held that an employer was bound by the results of multi-employer

bargaining because it had not unequivocally or timely withdrawn from such multi-employer bargaining.

Billington Builders Supply, Inc., is bound by the results of the collective bargaining between Velikanj and Wehde.

*NLRB v. Sheridan Creations, Inc.* (2nd C. A. 357 F. 2d 245, 61 LRRM 2586.

*NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F. 2d 55, 63 LRRM 2217.

*Korner Kafe, Inc.*, 156 NLRB No. 107, 61 LRRM 1213.

*Quiel Bros. Electric Sign Service Co., Inc.*, 15 NLRB No. 28.

*Detroit Window Cleaners Union, Local 139 (Dalyte Service Co.)* 126 NLRB No. 8, 45 LRRM 1273.

*Anderson Lithograph Co.*, 124 NLRB No. 117, 4 LRRM 1544.

**D. S. Billington d/b/a Billington Builders Supply and the former employer and Billington Builders Supply Inc., as the “successor employer” were each required to arbitrate the effect of the acquisition of the business on the rights of employees.**

Section 17 of the 1961-1963 collective bargaining agreement between plaintiff and D. S. Billington d/b/a Billington Builders Supply provided for either giving notice of termination, or notice of opening the agreement for negotiation of changes. (Pltf’s Ex. 1) The plaintiff did not terminate the agreement but



mer it gave merely notice of opening the agreement for negotiation of changes (Plaintiff's Ex. 2). This fact, together with the fact that defendant Billington Builders Supply, Inc., was a "successor employer," requires that irrespective of whether Billington Builders Supply, Inc., is bound by the 1963-1966 collective bargaining agreement each defendant is required to arbitrate the effect of the acquisition of the business on the rights of the employee James Smith.

*Vackenhut Corp. v. Plant Guard Workers, Local 5*, (9th C. A.) 332 F. 2d 954, 56 LRRM 2466.

*John Wiley & Sons v. Livingston*, 376 U.S. 543, 118 S. Ct. 1148, 24 L. Ed. 2d 898.

*Local Lodge 595, District 152, I.A.M. vs. Howland Co.*, 350 F. 2d 508, 60 LRRM 2065.

**Prayer of Complaint did not preclude Court from granting relief to plaintiff.**

In his initial oral decision the Trial Court found that Billington Builders Supply, Inc., was estopped to deny the claim of James Smith (Tr. 112a-112g). In the subsequent Memorandum Decision the Trial Court stated:

"Previously, the Court announced that Billington was estopped to deny Smith's claim, but the Court now believes it was in error because Smith's bargaining representative asks only that Smith's claim be arbitrated in accordance with the terms of the agreement, and the Court has previously found that no agreement existed between the union and Billington. Therefore, the Court has no power or authority to grant relief to Smith in excess of that claimed by his bar-

gaining agent in the complaint.” (Tr. 120)

We are dealing here with a long collective bargaining history which established Velikanje's implied authority to bind his clients. Always in the past each of the employers had signed the agreement which resulted from the negotiations between Velikanje and Wehde. (Tr. 68) Never had Teamster Local 524 negotiated a contract with an employer after completing negotiations with Velikanje. (Tr. 66) Teamster Local 524 had every reason to believe and was entitled to believe that Billington Builders Supply Inc. had agreed to the 1963-1966 collective bargaining agreement; particularly is this true in light of the fact that defendants adhered to all the terms and conditions of such agreement.

The Trial Court should have found that Billington Builders Supply, Inc., was estopped from denying the existence of the collective bargaining agreement in view of its adoption and ratification of same. *Lewis Cable*, 107 F. Supp. 196, 30 LRRM 2603. *Nelson v. Victory Electric Works* [U.S. Dist. Ct., Dist. Md.] LRRM 2652.

In view of Rule 54(c), F.R.C.P., the Trial Court did have authority to grant such relief. Rule 54(c) F.R.C.P. was called to the Trial Court's attention at the time of entry of the Findings of Fact and Conclusions of Law and Judgment.

## CONCLUSION

At the time of the termination of James Smith's employment with Billington Builders Supply, Inc., a collective bargaining agreement requiring arbitration of disputes existed between Plaintiff and Billington Builders Supply, Inc., either as the result of offer and acceptance or it resulted from the failure of Billington Builders Supply, Inc., to timely and effectively withdraw from the multi-employer bargaining. In any event, Billington Builders Supply, Inc., is estopped to deny the existence of such collective bargaining agreement.

The judgment in favor of defendants should be reversed.

Respectfully submitted,

VANCE, DAVIES, ROBERTS & BETTIS

By George H. Davies

Attorneys at Law

*Attorneys for Appellants*

411 Fourth Avenue Building  
Seattle, Washington 98101

MR. PERRY J. ROBINSON

Attorney at Law

*Attorney for Appellee*

3 Liberty Building  
Akima, Washington 98901



**CERTIFICATE OF SERVICE**

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these rules.

GEORGE H. DAVIES

Of Attorneys for Plaintiff-Appellant



# Appendices







## TABLE OF EXHIBITS

Plaintiffs:

Exhibit Number:	Marked:	Offered:	Admitted:
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 38, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 39, Tr. 11)	Tr. 11	Tr. 12
	(Vol. I, R. 39, Tr. 43)	Tr. 43	Tr. 43
	(Vol. I, R. 39, Tr. 34)	Tr. 43	Tr. 43
	Tr. 41	Tr. 42	Tr. 42-43
	Tr. 41	Tr. 42	Tr. 42-43
	Tr. 41	Tr. 42	Tr. 42-43
	Tr. 41	Tr. 42	Tr. 42-43
	Tr. 41	Tr. 42	Tr. 42-43
	Tr. 54	Tr. 55	Tr. 55

Defendants:

1	(Vol. I, R. 39, Tr. 31)	Tr. 31	Tr. 31
2	(Vol. I, R. 39, Tr. 31)	Tr. 31	Tr. 31
3	(Vol. I, R. 39, Tr. 31)	Tr. 31	Tr. 31
4	(Vol. I, R. 39, Tr. 31)	Tr. 31	Tr. 31

